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Foo Khoon Long v Foo Khoon Wong

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HIGH COURT (IPOH) — CIVIL SUIT NO 22–119 OF 2007
VT SINGHAM J
18 AUGUST 2009

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Civil Procedure — Contempt of court — Order of committal, application for — Breach of terms of ex parte injunction — Whether defendant and two other contemnors had proper notice of terms of injunction they had allegedly breached — Whether proof beyond reasonable doubt required

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The defendant was appointed as the executor and trustee of the estate of Chen Choi Thai, deceased ('the deceased'), the mother of both the plaintiff and defendant. The deceased owned 244,760 unit of shares ('the shares') in Foo Holding Sdn Bhd ('the company'), which had not been distributed. On 3 May 2007, the shares were transmitted into the name of the defendant as

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the executor and trustee of the estate of the deceased. The plaintiff/applicant ('plaintiff'), one of the beneficiaries of the estate of the deceased, filed a civil suit against the defendant for, inter alia, maladministration, fraud and breach of trust in respect of the assets of the deceased. The plaintiff submitted that the transmission of the shares into the name of the defendant was sudden and

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was intended to allow the first defendant to use the shares to vote in the extraordinary general meeting ('EGM') to be held on 7 May 2007. At the EGM, the plaintiff had proposed to remove one Dr Foo Loke Kong as director, and it was the plaintiff's case that the defendant would use the shares to vote against that proposal. Accordingly the plaintiff applied by way of an

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ex parte injunction ('the injunction') to restrain the defendant from using the shares to vote at the EGM to be held on 7 May 2007. At 11am on 7 May 2007, the court granted the plaintiff the injunction to restrain the first defendant and any other members of the company from using the shares to vote during the EGM of the company held on 7 May 2007 at 10.30am. The

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express terms of the injunction included a positive term, a restraining term and an obligation. The positive term was that the EGM could proceed on 7 May 2007 at 10.30am, the restraining term prevented the defendant from using the shares to vote and the obligation required the secretary of the company to restrain the defendant from using the shares to vote. Thereafter

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at about 11.08am the terms of the injunction were allegedly explained to a freelance process server ('the process server') within eight minutes over the telephone by the plaintiff's counsel. The process server then communicated the terms of the injunction to the defendant and other members of the company present at the EGM. However, it was the plaintiff's contention that

despite being informed of the terms of the injunction the defendant had refused to comply with its terms. Consequently, the plaintiff alleged that the first defendant had breached the terms of the injunction which amounted to a contempt of court, and that two others ('the two other contemnors') had aided and abetted the first defendant in committing the breach of the terms of the injunction. Upon being granted leave to commence committal proceedings, the plaintiff proceeded by way of this notice of motion. By way of this application the plaintiff sought an order committing the defendant and two other contemnors to prison for contempt of court. It was the plaintiff's contention that the first defendant had refused to comply with the terms of the injunction despite being informed of the same and that the two other contemnors had aided and abetted the first defendant to breach the terms of the injunction. The notice of motion was supported by an affidavit affirmed by the plaintiff. The defendant and the two other contemnors contested this notice of motion and filed their affidavits in reply. The issue before the court was whether the defendant and the other contemnors were in contempt of court for the alleged breach of the injunction.

Held, dismissing the notice of motion with costs:

(1) Although it is settled law that the terms of an injunction must be strictly observed, a person will only be guilty of contempt of court for breach of an injunction if it is proven beyond reasonable doubt that the alleged contemnors had proper notice of the terms of the injunction. Although the plaintiff in the instant case stated that the defendant had been informed of the terms of the injunction before the voting took place in the EGM on 7 May 2007, the question that needed to be addressed was, at what time and at what stage of the EGM the defendant had been informed of the terms of the injunction granted on the same day at 11am. There was conflicting evidence and doubt on the material facts relating to the charge, such as whether the first defendant and the two other contemnors had notice of the terms of the injunction; and whether the terms of the injunction were explained to the process server by the plaintiff's counsel for him to have communicated the same to the members at the EGM (see paras 7, 12 & 14).

(2) There was a further doubt as to whether the process server had produced any letter of authority from the plaintiff's solicitors to identify or introduce himself when he made the alleged announcement to the members present at the EGM. This was because otherwise the defendant and the two other contemnors were not legally obliged to accept the announcement from a complete stranger (see para 18).

(3) Although the court had granted leave to the plaintiff to commence

committal proceedings against the defendant and two others, this did not necessarily mean that the charge had been proved beyond reasonable doubt. This was because at the leave stage there was only a prima facie case of contempt which was based on an ex parte application (see para 21).

(4) On the totality of the evidence the court was not satisfied that the defendant and the two other contemnors had notice of the express terms of the injunction and had consequently breached the same. The facts contained conflicting evidence on the material issue as to whether the defendant and the two others had notice of the terms of the injunction. There were two sets of minutes produced at the committal proceedings which were conflicting in several material aspects of the facts such as when the meeting had started, when the voting had commenced and the time when the meeting was concluded. It is settled law that where a set of facts in a criminal case had more than one inference which can be drawn, the inference most favourable to the accused person should be adopted. Further, the fact that the express terms of the injunction in the instant case included a positive term, a restraining term and an obligation, raised the question whether it was practically possible to convey the whole terms of the injunction over the telephone to the process server and then from the process server to the members present at the EGM within that short period of time. The doubts in this case also raised questions such as whether the process server had reduced what was conveyed over the telephone to him into writing before he had announced the terms of the injunction to the members at the EGM or if it was from his memory; and whether the plaintiff's counsel could have conveyed the exact terms of the injunction to the process server within 8 minutes (see paras 16–17, 27, 32–33).

(5) Thus, the question of the defendant and the two other contemnors having breached the terms of the injunction did not arise because they had no knowledge of the terms of the injunction. As such, the defendant and the two other contemnors could not be committed for contempt of court (see paras 33–34).

(6) The cases relied on by the plaintiff are distinguishable on the facts and circumstances and did not apply to the facts and circumstances in the instant case (see para 29).

[Bahasa Malaysia summary

Defendan telah dilantik sebagai wasi dan pemegang amanah harta pusaka Chen Choi Thai, si mati ('si mati'), ibu kepada kedua-dua plaintif dan defendan. Si mati memiliki 244,760 unit saham ('saham tersebut') dalam Foo

Holding Sdn Bhd ('syarikat tersebut'), yang tidak diagihkan. Pada 3 Mei 2007, saham tersebut telah ditukar kepada nama defendan sebagai wasi dan pemegang amanah harta pusaka si mati. Plaintif/pemohon ('plaintif'), salah seorang benefisiari harta pusaka si mati, telah memfailkan guaman sivil terhadap defendan untuk, antara lain, salah tadbiran, fraud dan pelanggaran amanah berkaitan aset-aset si mati. Plaintif menghujah bahawa penukaran saham tersebut kepada nama defendan adalah secara tiba-tiba dan bertujuan untuk membenarkan defendan pertama menggunakan saham tersebut untuk mengundi dalam mesyuarat agung luar biasa ('EGM') yang diadakan pada 7 Mei 2007. Semasa EGM itu, plaintif telah mencadangkan untuk menyingkir Dr Foo Loke Kong sebagai pengarah; dan adalah kes plaintif bahawa defendan akan menggunakan saham tersebut untuk mengundi terhadap cadangan tersebut. Oleh itu plaintif telah memohon melalui injunksi ex parte ('injunksi tersebut') untuk menyekat defendan daripada menggunakan saham tersebut untuk mengundi di EGM tersebut yang diadakan pada 7 Mei 2007. Pada pukul 11 pagi pada 7 Mei 2007, mahkamah membenarkan injunksi tersebut untuk menghalang defendan pertama dan mana-mana ahli lain syarikat tersebut daripada menggunakan saham tersebut untuk mengundi semasa EGM syarikat tersebut yang diadakan pada 7 Mei 2007 pada 10.30 pagi. Terma-terma nyata injunksi tersebut termasuklah terma positif, terma sekatan dan tanggungjawab. Terma positif itu adalah bahawa EGM boleh diadakan pada 7 Mei 2007 pada pukul 10.30 pagi, terma sekatan itu menghalang defendan daripada menggunakan saham tersebut untuk mengundi dan tanggungjawab tersebut menghendaki setiausaha syarikat tersebut menghalang defendan daripada menggunakan saham tersebut untuk mengundi. Berikutan itu lebih kurang pukul 11.08 pagi terma-terma injunksi tersebut dikatakan telah dijelaskan kepada penghantar saman mahkamah bebas ('penghantar saman mahkamah tersebut') dalam masa lapan minit melalui telefon oleh peguam plaintif. Penghantar saman mahkamah tersebut kemudian telah menyampaikan terma-terma injunksi tersebut kepada defendan dan ahli-ahli lain syarikat tersebut yang hadir di EGM tersebut. Walau bagaimanapun, adalah hujah plaintif bahawa meskipun telah dimaklumkan tentang terma-terma injunksi tersebut defendan telah enggan mematuhi terma-termanya. Akibatnya, plaintif mendakwa bahawa defendan pertama telah melanggar terma-terma injunksi tersebut yang membentuk penghinaan mahkamah, dan bahawa dua orang yang lain ('dua penghina mahkamah lain') telah membantu dan bersubahat dengan defendan pertama melakukan pelanggaran terma-terma injunksi tersebut. Setelah diberi kebenaran untuk memulakan prosiding komital, plaintif telah meneruskan dengan notis usul ini. Melalui permohonan ini plaintif memohon perintah menghukum defendan dan dua penghina mahkamah lain ke penjara kerana menghina mahkamah. Adalah hujah plaintif bahawa defendan pertama telah enggan mematuhi terma-terma injunksi meskipun telah dimaklumkan yang sama dan bahawa dua penghina mahkamah lain tersebut telah membantu dan bersubahat dengan defendan

A pertama melanggar terma-terma injunksi tersebut. Notis usul itu telah disokong oleh afidavit yang disahkan oleh plaintif. Defendan dan dua penghina mahkamah lain telah mempertikaikan notis usul ini dan memfailkan afidavit jawapan mereka. Isu di hadapan mahkamah adalah sama ada defendan dan penghina mahkamah lain telah menghina mahkamah
B kerana dikatakan melanggar injunksi tersebut.

Diputuskan, menolak notis usul dengan kos:

C (1) Meskipun ianya undang-undang tetap bahawa terma-terma injunksi tersebut hendaklah dipatuhi dengan ketat, seseorang hanya bersalah atas penghinaan mahkamah kerana melanggar injunksi jika dapat dibuktikan melampaui keraguan munasabah bahawa
D penghina-penghina yang dikatakan itu mendapat notis sewajarnya tentang terma-terma injunksi tersebut. Meskipun plaintif dalam kes ini menyatakan bahawa defendan telahpun dimaklumkan tentang terma-terma injunksi tersebut sebelum pengundian dibuat semasa EGM pada 7 Mei 2007, persoalan yang perlu diutarakan adalah, pada
E waktu bila dan pada peringkat mana EGM yang defendan telah dimaklumkan tentang terma-terma injunksi yang diberikan pada hari yang sama pada 11 pagi. Terdapat keterangan dan keraguan bercanggah pada fakta-fakta penting berkaitan pertuduhan itu, seperti sama ada
F defendan pertama dan dua penghina mahkamah yang lain telah diberitahu tentang terma-terma injunksi tersebut; dan sama ada terma-terma injunksi tersebut telah dijelaskan kepada penghantar saman mahkamah tersebut oleh peguam plaintif untuknya menyampaikan yang sama kepada ahli-ahli di EGM tersebut (lihat
G perenggan 7, 12, 14).

(2) Terdapat keraguan selanjutnya tentang sama ada penghantar saman mahkamah tersebut telah mengemukakan apa-apa surat kuasa daripada peguam plaintif untuk mengenalpasti atau memperkenalkan dirinya apabila dia membuat pengumuman yang dikatakan itu kepada ahli-ahli
H yang hadir di EGM tersebut. Ini adalah kerana jika tidak defendan dan dua penghina mahkamah lain tersebut tidak boleh dipertanggungjawabkan di sisi undang-undang untuk menerima pengumuman tersebut daripada orang yang tidak dikenali (lihat
I perenggan 18).

(3) Meskipun mahkamah telah memberikan kebenaran kepada plaintif untuk memulakan prosiding komital terhadap defendan dan dua yang lain, ini tidak semestinya bermaksud bahawa pertuduhan tersebut telah dibuktikan melampaui keraguan munasabah. Ini adalah kerana di

peringkat kebenaran tersebut hanya terdapat kes prima facie penghinaan yang berdasarkan permohonan ex parte (lihat perenggan 21).

(4) Berdasarkan keseluruhan keterangan mahkamah tidak berpuas hati bahawa defendan dan dua penghina mahkamah lain tersebut telah diberitahu tentang terma-terma injunksi yang nyata tersebut dan berikutan itu telah melanggar yang sama. Fakta-fakta mengandungi keterangan yang bercanggah atas isu yang penting berhubung sama ada defendan dan dua yang lain mempunyai pengetahuan mengenai terma-terma injunksi tersebut. Terdapat dua set minit yang dikemukakan di prosiding komital yang bercanggah dalam beberapa aspek penting fakta-fakta seperti bila mesyuarat tersebut bermula, bila undian bermula dan bila masa mesyuarat berakhir. Adalah undang-undang tetap bahawa di mana set fakta dalam kes jenayah mempunyai lebih daripada satu inferens, inferens yang lebih memihak kepada tertuduh patut digunakan. Tambahan, hakikat bahawa terma-terma injunksi yang nyata tersebut dalam kes ini termasuklah terma positif, terma sekatan dan tanggungjawab, menimbulkan persoalan sama ada ia boleh dikatakan mungkin untuk menyampaikan keseluruhan terma-terma injunksi tersebut melalui telefon kepada penghantar saman mahkamah tersebut dan kemudian daripada penghantar saman mahkamah tersebut kepada ahli-ahli yang hadir di EGM tersebut dalam tempoh masa yang pendek. Keraguan-keraguan dalam kes ini juga menimbulkan persoalan-persoalan seperti sama ada penghantar saman mahkamah telah menjadikan apa yang disampaikan melalui telefon kepadanya ke dalam bentuk tulisan sebelum dia menyatakan terma-terma injunksi tersebut kepada ahli-ahli di EGM tersebut atau jika ia daripada ingatannya; dan sama ada peguam plaintif mungkin telah menyampaikan terma-terma injunksi yang sebenar kepada penghantar saman mahkamah dalam tempoh 8 minit (lihat perenggan 16, 17, 27, 32–33).

(5) Oleh itu, persoalan tentang defendan dan dua penghina mahkamah lain tersebut yang telah melanggar terma-terma injunksi tersebut tidak timbul kerana mereka tiada pengetahuan tentang terma-terma injunksi tersebut. Dengan itu, defendan dan dua penghina mahkamah lain tersebut tidak boleh dituduh menghina mahkamah (lihat perenggan 33–34).

(6) Kes-kes terhadap mana plaintif telah bergantung mempunyai fakta dan keadaan yang berbeza dan tidak terpakai kepada fakta dan keadaan dalam kes ini (lihat perenggan 29).]

Notes

For cases on application for order of committal, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1822–1840.

Cases referred to

Acrow (Automation) Ltd v Rex Chainbelt Inc & Anor [1971] 3 All ER 1175, CA (refd)

Alligarh Municipal Board & Ors v Ekka Tonga Mazdoor v Union & Ors AIR 1970 SC 1707 (refd)

Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193, SC (refd)

Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Splendour' [1999] 6 MLJ 652, HC (refd)

B (JA) (An Infant), Re [1965] 1 Ch 1112, (refd)

Bramblevale Ltd, Re [1970] Ch 128, CA (refd)

Carl-Zeiss-Stiftung v Rayner & Keeler [1960] 3 All ER 289, Ch D (refd)

Cartier International BV v Lee Hock Lee & Another Application [1993] 1 SLR 616, HC (refd)

Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152, HL (refd)

Cham Pei Chin & Ors v Yap Sau Foong @ Yap Ah Kit & Ors [2000] MLJU 306, HC (refd)

Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240, HC (refd)

Churchman & Ors v Joint Shop Stewards' Committee of Workers of the Port of London & Ors [1972] 3 All ER 603, CA (refd)

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1) [2005] 5 MLJ 489, HC (refd)

Dato' Seri Yusof Dato' Biji Sura lwn BTM Timber Industries Sdn Bhd & Yang Lain [2007] 7 CLJ 330, HC (refd)

Eastern Trust Co v Mc Kenzie, Mann & Co Ltd [1915] AC 750, PC (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)

George v Secretary of State for the Environment & Anor (1979) 38 P & CR 609 (refd)

Harding v Tingery (1864) 12 WR 684 (refd)

Houng Hai Hong & Anor v MBf Holdings Bhd & Anor & 3 other appeals [1995] 4 CLJ 427, SC

Iberian Trust Ltd v Founders Trust And Investment Co Ltd [1932] 2 KB 87, KBD (refd)

IJM Corp Bhd v Harta Kumpulan Sdn Bhd (2) [2008] 8 CLJ 308, HC (refd)

Ipmuda Trading Sdn Bhd v Khoo Kiat Piau T/A Ying's Trading & Anor [1996] 5 MLJ 637; [1997] 1 CLJ Supp 158, HC (refd)

Kepong Industrial Park Sdn Bhd & Ors v Teo Seng Aun & Ors (No 3) [2000] 4 MLJ 614, HC (refd)

Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v MD Jaafar bin Abdul Carrim & Anor [1998] 2 MLJ 244, HC (refd)

KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd [1994] 2 MLJ 201, SC (refd)

Knight & Anor v Clifton & Ors [1971] Ch 700, CA (refd)

Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong [1999] 6 MLJ 38, HC (distd)
Langley, Ex-parte Smith, In Re Bishop, Ex-parte (1880) 13 Ch D 110, CA (refd)
Lee Lim Huat v Yusof Khan bin Ghous Khan & Anor [1997] 2 MLJ 472; [1997] 3 CLJ 197, CA (refd)
Lord Wellesley v Earl of Mornington (1848) 11 Beave 181; 50 ER 786 (refd)
Mcllraith v Gredy [1968] 1 QB 468, CA (refd)
Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239, HC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Pertamina Energy Trading Ltd v Karaha Bodas Co LLC [2007] SGCA 10, CA (refd)
Polygram Records Sdn Bhd & Ors v Phua Tai Eng [1986] 2 MLJ 87, HC (refd)
Royal British Bank v Turquand [1843–60] All ER 435 (refd)
Seaward v Paterson [1897] 1 Ch 545, CA (refd)
Seraglio, The (1885) 10 PD 120 (refd)
Sher Singh v RP Kapur AIR 1968 Punj 217 (refd)
Spokes v Banbury Board of Health (1865) LRI EQ 42 (refd)
Syed Ibrahim bin Syed Abd Rahman v Liew Soo Chin (f) [1984] 1 MLJ 160, FC (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105, CA (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126, FC (refd)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151, FC (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)
Yai Yen Hon & Ors v Ling Mong Sam [1997] 2 MLJ 190; [1997] 2 CLJ 812, CA (refd)
Young Nyuk Fung & Anor v Tow Boon Pin & Ors [2006] 7 CLJ 269 (refd)
Z Ltd v A–Z And AA–LL [1982] AC 191, CA (refd)

Legislation referred to

Companies Act 1965 s 156(1B), 156(2)
Rules of the High Court 1980 O 45 r 7(6)(b), O 52 r 2(2)

Leong Kok Leong (Mohamad Khiril Abidin with him) (Kean Chai & Sivalingam) for the plaintiff.
SY Lee (Mohd Noor & SY Lee) for the first respondent.
James Devadason (Hemalatha Ramalu with him) (Maxwell, Kenion, Cowdy & Jones) for the second respondent.
KL Wong (KL Wong) for the third respondent.

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VT Singham J:

[1] This is an application by notice of motion dated 14 June 2007 (encl 47)
B by Foo Khoon Long, the plaintiff, to issue an order:

(a) That Foo Khoon Wong be committed to prison for his contempt of court for refusing to comply with the ex parte injunction dated 7 May 2007. (encl 9)

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(b) That Foo Loke Kong and Foo Khoon Loong be committed to prison for their contempt of court for *aiding and abetting* Foo Khoon Wong whereby the action has caused and/or to facilitate the breach and/or refusal to comply with the said ex-parte injunction dated 7 May 2007 whereby their action has resulted in an unlawful interference with the
D administration of justice.

(c) That all the three (3) contemnors be ordered to pay the costs occasioned by this application to the plaintiff and any order made herein be borne by the respondents.

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[2] For the purpose of his notice of motion (encl 47), the plaintiff and the alleged contemnors will be referred to as 'the applicant' and 'the first, second and third respondents' respectively.

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[3] The notice of motion is supported by an affidavit (encl 47A) affirmed by the applicant and the statement (encl 24) which was filed as required by O 52 r 2(2) of the Rules of the High Court 1980. The respondents have contested this notice of motion and have filed their affidavits in reply.

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[4] In order to arrive at a just decision in this committal proceeding against the respondents which is of a quasi criminal in nature, it is important to refer to some of the salient facts, circumstances and background of this case, which are relevant for the purpose of this committal proceedings and, briefly are as
H follows:

(a) The plaintiff has filed the above mentioned civil suit (encl 1) in this court on 3 May 2007 against the first respondent as the defendant, being the executor and trustee of the estate of Chen Choi Thai, deceased and, inter alia, has alleged against the first respondent briefly,
I as follows:

(i) Maladministration; fraud and breach of trust in respect of the assets of the deceased, Chen Choi Thai, who is the mother of both the applicant and the respondent.

(ii) The deceased Chen Choi Thai, had owned 244,760 unit of shares (the said shares in Foo Holding Sdn Bhd).

(iii) The said shares have not been distributed to the beneficiaries of the estate of Chen Choi Thai which included the applicant.

(iv) Until the date of the EGM which was held on 7 May 2007 (the subject matter of this committal proceedings), the said shares were held by the first respondent as the executor and trustee and was registered in that capacity on 3 May 2007.

(v) Prior to 6 April 2007 that is the date of the notice of Foo Holdings Sdn Bhd shareholders' extraordinary general meeting (EGM) to be held on 7 May 2007 at 10.30am, the said shares were held in the name of the estate of Chen Choi Thai, the deceased herself. The transmission into the name of the first respondent as executor and trustee on 3 May 2007 was sudden and was intended to allow the first respondent to use the said shares to vote in the EGM on 7 May 2007 against the proposal to remove one Dr Foo Loke Kong as a director as proposed by the applicant.

(vi) The said shares were held on trust for the beneficiaries as stated in the last will and testimony of the said deceased dated 21 June 1988.

(vii) Accordingly, the applicant had applied by an ex parte injunction to restrain the first respondent from using the said shares of the estate of Chen Choi Thai to vote at the EGM which this court had on 7 May 2007 granted admittedly at 11am.

[5] On 11 June 2007 this court having found that there was a prima facie case made out against the respondents to answer the charge as framed for contempt of court had granted leave ex parte to commence the committal proceedings. Pursuant to the said order of granting leave, this notice of motion was filed on 14 June 2007 by the applicant to issue an order, that is to say, the respondents who are now the alleged contemnors be committed to prison for contempt of court which has resulted from the alleged breach of the terms of the ex parte injunction dated 7 May 2007 (encl 9) granted by this court. For easy reference, it is important, to include in this decision, the terms of the ex parte injunction given by this court on 7 May 2007:

(i) **ADALAH DIPERINTAHKAN** bahawa Defendan dilarang dan dihalang melalui dirinya ataupun agennya, proxinya, pengkhidmatnya termasuk setiausaha syarikat Foo Holdings Sdn Bhd iaitu Chua Chye Hwa dari Chua Management & Secretarial Services ataupun sebaliknya dalam apa cara jua pun dari menggunakan saham dari Harta Pusaka Chen Choi Thai yang memiliki saham di dalam syarikat Foo Holdings Sdn Bhd berjumlah 244,760 unit saham dengan Sijil Saham 0350042 atau Sijil Saham 60 dan/atau 61 dengan Lot Pindahmilik No T26

(selepas ini dirujuk sebagai 'saham tersebut') di dalam apa cara jua pun untuk mengundi di dalam Mesyuarat Agung Luar Biasa syarikat Foo Holdings Sdn Bhd yang akan diadakan pada 7.5.2007 jam 10.30 pagi berdasarkan Notis bertarikh 6.4.2007 atau mana-mana mesyuarat syarikat Foo Holdings Sdn Bhd sehingga keputusan muktamad Mahkamah Yang Mulia ini diperolehi dalam tindakan sivil ini;

(ii) **ADALAH DIPERINTAHKAN** bahawa Defendan dilarang dan dihalang melalui dirinya ataupun agennya, proxinya, pengkhidmatnya ataupun sebaliknya dalam apa cara jua pun dari memindahkan dan mendaftarkan saham tersebut kepada namanya secara peribadi sehingga tindakan sivil ini diputuskan muktamad oleh Mahkamah Yang Mulia ini;

(iii) **DAN ADALAH DIPERINTAHKAN** bahawa Mesyuarat Agung Luar Biasa syarikat Foo Holdings Sdn Bhd boleh diteruskan pada 7.5.2007 jam 10.30 pagi kecuali bahawa setiausaha syarikat Foo Holdings Sdn Bhd, Chua Chye Hwa dari Chua Management & Secretarial Services adalah sekarang mesti mematuhi Perintah-Perinah di sini terhadap Defendan dengan serta-merta semasa Mesyuarat Agung Luar Biasa tersebut dijalankan pada 7.5.2007 jam 10.30 pagi di dalam premis dan pejabat Chua Management & Secretarial Services dan melarang Defendan dari mengundi dengan menggunakan saham-saham dari Harta Pusaka Chen Choi Thai. (Emphasis added.)

[6] The primary and basic ingredient of the charge as framed by the applicant is that, the first respondent after having been informed or notice having been given of the said ex parte injunction had refused to comply with the terms of the said ex parte injunction. Consequently, it has been alleged that the first respondent had breached the same which in law is contempt of court and that the second and third respondents have aided and abetted the first respondent in committing the breach of the terms of the said ex parte injunction.

[7] It is settled law that the terms of an injunction must be strictly observed (see *Spokes v Banbury Board of Health* (1865) LRI EQ 42; *Harding v Tingery* (1864) 12 WR 684; *Knight & Anor v Clifton & Ors* [1971] Ch 700; and *Eastern Trust Co v Mc Kenzie, Mann & Co Ltd* [1915] AC 750). However, this court will only find a person guilty and punish for contempt of court for breach of the injunction if satisfied that, in the instant case, the alleged contemnors had proper notice of the terms of the breach of the injunction and is proved beyond reasonable doubt (see *Re Bramblevale Ltd* [1970] Ch 128; *Knight & Anor v Clifton & Ors* [1971] Ch 700). The burden of proof on the applicant in these committal proceedings is similar to the prosecution in a criminal trial. A contempt of court is an offence of a criminal character.

A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt (see *Re Bramblevale Ltd* [1970] Ch 128 at p 137); (see *Wee Choo Keong v MBF Holdings Bhd & Anor* [1995] 3 MLJ 540 at p 574; *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240; *Dato' Seri Yusof, Dato' Bijisura v BTM Timber Industries Sdn Bhd & Yang Lain* [2007] 7 CLJ 330; *Young Nyuk Fung & Anor v Tow Boon Pin & Ors* [2006] 7 CLJ 269 at pp 304–305; *IJM Corp Bhd v Harta Kumpulan Sdn Bhd (2)* [2008] 8 CLJ 308 at pp 332–333; *Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 MLJ 652; *Alligarh Municipal Board & Ors v Ekka Tonga Mazdor v Union & Ors* AIR 1970 SC 1707, applied in *Wee Choo Keong v MBF Holdings Sdn Bhd*; *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1)* [2005] 5 MLJ 489 at pp 529–530; *Tay Seng Keng v Tay ek Seng Co Sdn Bhd* [1978] 1 MLJ 126; *Polygram Records Sdn Bhd & Ors v Phua Tai Eng* [1986] 2 MLJ 87).

[8] The applicant therefore has to prove beyond reasonable doubt that, the respondents had notice of the terms of the ex parte injunction and acted in breach of the said injunction. If there is a doubt as to the conduct of the respondents, no order for committal shall be made (see *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 1239). Indeed such notice of the said injunction must be proved beyond reasonable doubt (see *Churchman & Ors v Joint Shop Stewards' Committee of Workers of the Port of London & Ors* [1972] 3 All ER 603 at p 604). All that is necessary to demonstrate is that, the alleged contemnors did in fact, with the knowledge of the terms of the said injunction disobeyed it (see *Cartier International BV v Lee Hock Lee and another application* [1993] 1 SLR 616 at p 617). In other words, it is a prerequisite to prove that the respondents had notice of the terms of the injunction and it must be proved beyond all reasonable doubt.

[9] 'Contempt of court even of the type that consists a breach of an injunction or undertaking, is something that may carry personal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent' (see *Knight & Anor v Clifton & Ors* [1971] Ch 700 at p 707). Whilst, prima facie, orders of court ordinarily bind only the parties in the action, in the instant case, the first respondent but third parties like the second and third respondents may also be guilty of contempt (see *Seaward v Paterson* [1897] 1 Ch 545 cited in *Acrow (Automation) Ltd v Rex Chainbelt Inc & Anor* [1971] 3 All ER 1175 at p 1180; *Lord Wellesley v Earl of Mornington* (1848) 11 Beave 181; 50 ER 786; *Z Ltd v A–Z And AA–LL* [1982] AC 191).

[10] In the circumstances, it is important at this stage to stress that unless this court is satisfied that the charge has been established beyond reasonable doubt, this court will not exercise its powers for contempt on mere probabilities. This court will also not permit an applicant to move this court to invoke its contempt powers for wrecking vengeance against the alleged contemnors as there are no general rules by which any particular case may be judged as constituting contempt as each case must be considered and dealt with separately and on its own set of facts (per Russel J in *Carl Zeiss Stiftung v Rayner & Keeler* [1960] 3 All ER 289). The contempt power must be used sparingly and only when the court is satisfied that there has been a deliberate or willful defiance or conduct on the part of the alleged contemnors and that the charge has been proved beyond reasonable doubt, otherwise that power which is like a sword should be kept in the sheath and remain in the court for protection.

[11] The power to punish for contempt of court should be used sparingly and only in serious cases and its usefulness depends on the wisdom and restrain with which it is being used. The judicial weapon, the power of committal for contempt or contempt proceedings is for contempt of court and not of the presiding judge. In *Sher Singh v RP Kapur* AIR 1968 Punj 217, Mehar Singh CJ said at p 223 which was referred to in *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193:

> A contempt of court is basically an offence against the court and not against the judge personally and it is punishable because of the necessity of maintaining the dignity of and respect towards the court. The power to punish for contempt is exercised to vindicate the court's dignity. Law reports are full of judicial decisions explaining the true purpose and wide scope and effect of the power of the superior courts to punish for contempt and also the limits within which a litigant is entitled to insinuate against the courts. This power quite clearly does not depend on the personal desire of a private party whether or not to pursue the proceedings for contempt even though initiated by it. Proceedings for contempt are undisputedly of quasi criminal nature. The death of the party initiating contempt proceedings would, therefore, seem to us to be of the least import. Once the proceedings get going, it quite clearly becomes a matter between the contemnor on the one hand, and, the court, of which the contempt is stated to have been committed, on the other. Contempt of court, if I may put it, is a mysterious and indefinable offence, being as easy to commit as it is liable to speedy and deserved punishment. Since the foundation of our present judicial system to punish for contempt is really regarded as 'of its own class' (*sui generis*), in order to keep the courts of justice free, impartial and objective. Courts by their very creation, are vested with the inherent power, inter alia, to preserve themselves from the approach of pollution however subtly designed. With the death of the person approaching this court with the allegation of someone having committed contempt of court, therefore the proceedings cannot be held to cease to be competent.

[12] The court finds that, the applicant has stated that the first respondent had been informed of the terms of the ex parte injunction before the voting took place on 7 May 2007. On the other hand, the applicant has also stated and argued that the first respondent should have investigated and sought confirmation or clarification from the applicant's lawyer of the ex parte injunction if he was not sure. The question that is troubling this court is, was the first respondent in the first instance, informed of the terms of the said ex parte injunction given on 7 May 2007 and admittedly at 11am and if so, at what time and what stage of the EGM.

[13] The ex parte injunction which was granted by this court and admittedly at 11am was to restrain Foo Khoon Wong, the first respondent, from using 244,760 unit shares of the estate of Chen Choi Thai vide Share Certificate No 0350042 or Share Certificate No 60 and/or 61 transfer Lot No T26 to vote during the *EGM of Foo Holdings Sdn Bhd held on 7 May 2007 at 10.30am* and any other members of the said company — but however, the EGM could proceed on 7 May 2007 as part of the terms of the ex parte injunction. (Emphasis added.)

[14] This court finds there is conflicting evidence and doubt on material facts relating to the charge:

(a) whether the first respondent and/or the second and third respondent had in fact notice of the express terms of the ex parte injunction;

(b) whether the terms of ex parte injunction was explained to them and what was conveyed to En Albert Francis, the freelance process server over the telephone at 11.08am by En Leong, the plaintiff's counsel and what was announced by En Albert Francis to the members present at the EGM as the charge against the first respondent is for having breached the terms of the said ex parte injunction.

[15] It is important to immediately point out that the significance of the terms of the said ex parte injunction must be clearly explained to the first respondent because it has the negative and positive effect ie what the first respondent cannot do being the first part of the injunction and the second part states what he can do. The positive effect in that, the EGM could proceed on 7 May 2007 at 10.30am. Further, there is also an obligation on the part of the secretary, Chua Chye Hwa of Chua Management and Secretarial Services for Syarikat Foo Holdings Sdn Bhd to comply with the said injunction against the first respondent to restrain the first respondent from voting by using the said shares.

[16] In addition, there are two sets of minutes produced in this committal proceedings which are conflicting in several material aspect of the facts as to

A when the meeting had started, the time of the voting and the time the meeting was concluded. The minutes of the meeting produced by Foo Loke Kong in encl 73, states the meeting started at 10.45am and was concluded at 11.10am. Based on this set of minutes and the admission on behalf of the applicant that En Albert Francis was informed of the ex parte injunction only
B at 11.08am, it would appear that there was only two (2) minutes left before the meeting was concluded. On the other hand, the other set of minutes produced on behalf of the applicant states otherwise. It is settled law that where a set of facts in a criminal case has more than one inference which can be drawn, the inference most favourable to the accused person should be
C adopted (see *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105 at p 108).

[17] As stated above, it would appear that the conversation between
D En Leong Kok Keong and En Albert Francis lasted only about eight (8) minutes, and the issues are, whether:

(a) It was possible to have informed En Albert Francis of the express terms of the ex parte injunction over the telephone within the eight (8) minutes, bearing in mind, there were three (3) different set of terms
E contained in the injunction.

(b) It was read out in verbatim ie in Bahasa Malaysia or was it a translation of the terms of the ex parte injunction which was in Bahasa Malaysia and conveyed in the English language and, whether:

F

(i) It was possible for Albert Francis to have conveyed the terms of the said ex parte injunction which contained a restraining term, a positive term and an obligation imposed upon the secretary Chua Chye Hwa of Chua management and secretarial services for Syarikat
G Foo Holdings Sdn Bhd, that the secretary must comply with the terms of the injunction against the first respondent and the members present at the meeting within two (2) minutes.

(ii) On the other hand, did En Albert Francis take down the terms of the ex parte injunction when it was communicated to him by En Leong
H Kok Keong over the telephone and which admittedly lasted only eight (8) minutes ie from the time this court had granted the said injunction at 11.00am in chambers and considering the fact that En Leong had to leave the chambers and organise the use of the telephone of En Khairil and then inform En Albert Francis.

I The question is, whether it was practically possible to convey the whole terms of the said ex parte injunction over the telephone to En Albert Francis and then from En Albert Francis to the members present at the EGM within that short period of time and what time did En Albert Francis actually announce to the members present at

the EGM and was it the whole of the terms of the said ex parte injunction. All this evidence on the issues which are material, is not clear as it must be made clear to the first, second and third respondents as it is crucial in order to establish the charge beyond reasonable doubt. However, it is regrettable that all this matters as raised by this court and as submitted on behalf of the first respondent remains unclear and doubtful. As stated above, the terms of the ex parte injunction expressly allows the EGM to proceed and it is not a complete prohibition for the EGM to proceed and whether all this terms were clearly explained to the respondents and the members present at the EGM remains unclear (see *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87 refer to in *TO Thomas v Asia Fishing Industry PE Ltd* [1977] 1 MLJ 151 at p 156)

[18] In addition, En Albert Francis was a complete stranger to the respondents and the members present at the EGM and this is not denied. Therefore, the question which remain is, did En Albert Francis introduces himself with any letter of authority and spell out the terms of the said injunction. There is also an admission by En Albert Francis by his affidavits (encls 110 and 112) in that, he is a freelance process server for several legal firms and one of them is the firm of solicitors for the applicant and admittedly, he is not a staff of any of the firm of solicitors including the firm of solicitors for the applicant. It is also stated that he is self employed and not a paid employee of any firm. In any event, an important factor in this context is, did he produce any letter of authority from the applicant's solicitors to identify or introduce himself when he made the announcement as alleged to the members present at the EGM and this fact also remains unclear and doubtful as the respondents and the members present at the EGM are surely not obliged to comply with any announcement made by a stranger who enters the hall of a private meeting. If he did not produce a letter of authority from the applicant's solicitors authorising him to make the announcement, are the members present at the EGM and the respondents legally obliged to accept the announcement from a complete stranger who himself has no personal knowledge of the terms of the said injunction if in fact the terms of the ex parte injunction was actually announced and this has not been adequately dealt with by the applicant.

[19] Where notice of the terms of the order of court is conveyed through telephone, it has been held that it is a desirable practice for the terms to be communicated to the alleged contemnors by the solicitor for the party who had obtained the order as the person affected would have the responsibility for an officer of the court for what he was doing (see *Re Bishop, ex p Lungley, SP Smith* (1880) 13 Ch D 110 at p 122, *The Seraglio* (1885) 10 PD 120).

[20] It is also important to state that this court is conscious of the fact that notice of the ex parte injunction can be notified by telephone or otherwise as provided under O 45 r 7(6)(b) of the Rules of the High Court 1980 which is an exception to the rule but what is important is, the respondents must be notified of the terms of the injunction and not just a general statement of the injunction order having been granted by the court, an announcement made by a complete stranger who is alleged to have announced that there is an injunction granted by the High Court which goes to the crux of this committal proceedings, namely, breach of the terms of the said ex parte injunction. All these facts have raised doubt against the complaints of the applicant.

[21] Be that as it may, it is also important to state that the fact that this court had granted leave to the said applicant to commence this committal proceedings against the respondents pursuant to an ex parte application (encl 22) did not necessarily mean that this court was satisfied that the charge has been proved beyond reasonable doubt. At the time when the court had granted leave on 11 June 2007, it is pertinent to observe that there was only a prima facie case of contempt which was based on an ex parte application. In other words, it is merely a vetting process on an ex parte basis to consider if there was a prima facie of contempt and the court did not go into the merits (see *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217).

[22] However, it is important to appreciate that at this stage of the committal proceedings, the respondents are granted the right by affidavit evidence to raise doubt on the charge framed against them to rebut the prima facie case. Therefore, this court with respect, is of the considered view that there should not be too much emphasise to the fact that since leave has been granted to commence committal proceedings, it must necessarily mean that the respondents are guilty of contempt beyond reasonable doubt. The purpose of serving this notice of motion (encl 47) on the respondents which is heard inter parte is to grant the respondents an opportunity to answer or give their defence to the charge and for the court to consider on the totality of the evidence, whether the respondents have had succeeded in raising any doubt against the charge. In *Wee Choo Keong v MBF Holding & Anor and another appeal* [1993] 2 MLJ 217, Abdul Hamid Omar LP said at p 221:

> In the appeal before us leave to issue committal proceeding has been granted. This means that the learned High Court judge has accepted that there was a prima facie case for contempt against the appellant. It may well be that on the hearing of the motion proper, the appellant would be acquitted of any charge of contempt. The hearing of the ex parte application for leave was not adjudication on the merits of the case (see *Arthur Lee Meng Kwong v Faber Merlin Malaysia Berhad & Ors* [1986]

2 MLJ 194) which was followed in *Dato' Onn Abaa v Eagle Pagoda Brand Teck Aun Medical Factory Sdn Bhd & 5 Ors* [2003] 4 AMR 556–565.

[23] As to the cases referred to and relied on by the learned counsel for the applicant, this court finds that the facts and circumstances in those cases can be distinguished when compared to the facts and circumstances in the instant case, except to consider and apply the established judicial principles. Some of the cases, for instance, in *Houng Hai Ong & Anor lwn MBf Holdings Bhd*, the person concerned or the contemnor was a lawyer and in addition, there was evidence that he had knowledge of the case and the existence of the order or the order issued against him. As for the rule in *Turquand*'s case [1843–60] All ER 435, it does not, with respect, apply to the facts and circumstances in the instant case as *first*, there is insufficient evidence that the express terms of the ex parte injunction was told to the first respondent and on the facts, this court is not satisfied that it has established beyond reasonable doubt, *secondly*, the rule in *Turquand*'s case cannot be applied to the facts and the nature of the proceedings before this court as the respondents must be informed of the express terms of the injunction. In the instant case, the application of constructive notice has no place to the facts and circumstances. Lord Denning MR in *Mcllraith v Grady* [1968] 1 QB 468 said at p 477:

> … we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the terms has been strictly complied with …

[24] The case of *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201 and *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 relied on by learned counsel for the applicant to apply constructive notice against the respondent can be distinguished on the facts and are poles apart and does not apply to the facts in the instant case.

[25] As for the case in *Ex-parte Langley, Ex-parte Smith, In Re Bishop* (1880) 13 Ch D 110, the telegram was sent to the sheriff's office by the solicitors in London of an injunction having been granted by the Court of Bankruptcy to restrain a sale in the county under an execution. Therefore, the court held that the sheriff's officer should have telegraphed to the Court of Bankruptcy or to the London agents of the sheriff to ascertain whether an injunction has really been granted. Whereas in the instant case, Mr Albert Francis was a freelance process server and who held no official position either in the firm of the applicant's solicitors or the court nor was he an authorised representative of the applicant or the company. Therefore, he should have at least produced an authority letter from the firm of the applicant's solicitor to identify himself otherwise, it is only reasonable for the first respondent and

A the other members present at the EGM to regard him as a trespasser as he was a complete stranger to the first respondent and/or the second and third respondents and this fact cannot be denied. Accordingly, there was no basis or any reason for the first respondent to seek any clarification from learned counsel Mr Leong Kok Leong for the applicant or the court as they are
B entitled to disregard any announcement by a stranger, especially when he had not produced any letter of authority, ie in the event, he had informed the first respondent and the members present at the EGM of the express terms of the ex parte injunction.

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[26] In *Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong* [1999] 6 MLJ 38, relied on by learned counsel for the applicant, the parties were represented by their respective lawyers and the lawyers knew what the orders contained ie the orders which was given by the judge of the High Court and
D yet a letter of complaint was sent to the deputy registrar of the High Court on the ex parte orders made by the judge instead of seeking clarification or raising the arguments at the inter partes stage. Therefore, the court held that the contemnors cannot raise as defence that they had no notice of the ex parte order.

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[27] In any event, this court is not satisfied that the first respondent had been informed or had notice of the express terms of the said ex parte injunction or the second and third respondents were aware of the same and had consequently breached the terms of the said ex parte injunction, or that
F the second and third respondent had aided and abetted the first respondent to disobey the terms of the said ex parte injunction (see *Churchman & Ors v Joint Shop Steward's Committee of Workers of the Port of London & Ors* [1972] 3 All ER 603). There is also a reasonable doubt of the accuracy of either account of the communication between En Leong Kok Leong and En Albert
G Francis and thereafter as to what was actually announced by En Albert Francis as alleged. In fact, there is doubt *first*, whether the exact terms of the ex parte injunction could be conveyed within eight (8) minutes as according to the evidence for the applicant, the conversation between En Leong Kok Leong and En Albert Francis lasted for eight (8) minutes. Whereas according to the
H minutes marked as exh FKW1 of the affidavit of first respondent (encl 71), the EGM was over at 11.10am. *Secondly*, whether what was conveyed to Mr Albert Francis by En Leong was reduced into writing before he had announced as alleged to the members present at the EGM or was it from his memory. *Thirdly*, what was the exact terms that was conveyed to En Albert
I Francis and subsequently the alleged announcement made by En Albert Francis to the members present at the EGM and was it as per the terms of the said ex parte injunction. It is also important to consider that both the minutes, namely, exh FKW1 in the affidavit of the first respondent (encl 71) exh FLS1 in the affidavit of the second respondent (encl 74) and the minutes

marked as exh FKL1 in the affidavit of Foo Loke Shin (encl 105) are acceptable under s 156(1B) of the Companies Act 1965 and shall be evidence of the proceedings to which it relates under sub-s (2) of s 156.

[28] On the other hand, even if the court were to draw an inference as to whether the respondents were put on notice as to the terms of the ex parte injunction and consequently, to make a finding that they had breached the terms of the said ex parte injunction, that inference must rest on premises of facts established by credible evidence and the court cannot act on conjecture as conjecture is not inference. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) Lord Wright observed at p 169–170:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they have been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture (see also *Houng Hai Hong Lun MBF Holdings Bhd & Ors (Anor Appeal)* [1995] 3 AMR 3079).

[29] Accordingly, this court finds that those cases relied on by learned counsel for the applicant are distinguishable on the facts and circumstances of the particular cases and does not apply to the facts and circumstances in the instant case. It is important that this court should look at the facts and circumstances as a whole and to see whether there was any interference with the due administration of justice or the course of justice. This court finds there is no such evidence for this court to draw any such inference or that there was any interference with the course of justice.

[30] Be that as it may, this court is of the respectful view that rightfully and on the set of facts in the instance case which contains conflicting evidence on the material issue as to whether the respondents had notice of the terms of the ex parte injunction, and having had critically examined the affidavits on behalf of both parties, the applicant should have applied to cross-examine the deponents of the affidavit by and on behalf of the respondents (see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436; *Kepong Industrial Park Sdn Bhd & Ors v Teo Seng Han & Ors (No 3)* [2000] 4 MLJ 614 at p 616–617; *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126; *Ipmuda Trading Sdn Bhd v Khoo Kiat Piau T/A Ying's Trading & Anor* [1996] 5 MLJ 637; [1997] 1 CLJ Supp 158; *Yai Yen Hon & Ors v Ling Mong Sam* [1997] 2 MLJ 190; [1997] 2 CLJ 812 at p 822). When two opposing views are presented to the court by way of affidavit evidence as to what transpired from the time this court had granted the ex parte injunction and admittedly at 11am till the time members who were present at the EGM were informed,

this court is deprived of the basic rule of prudence, when testing the veracity of a party, by being allowed to observe the witnesses' demeanour, candour and conduct when testifying. When all things are equal, these observations can tilt the evidence (see *Kepong Industrial Park Sdn Bhd & Ors v Teo Seng Aun & Ors (No 3)* [2000] 4 MLJ 614 at p 616–617). In fact, it is for this court to determine in the first instance, whether statements contained in affidavit of both parties that are relied upon as raising a conflict of evidence upon a relevant fact having sufficient prima facie plausibility to merit or carry out further investigation as to the truth. In *George v Secretary of State for the Environment & Anor* (1979) 38 P & CR 609 Cumming Bruce LJ said (at p 620):

> The kind of situation in which I would expect cross-examination to be ordered is where the affidavits of one party are so unsatisfactory that, although they cannot be regarded without cross-examination as worthless evidence, they cannot be confidently accepted as evidence of fact without cross-examination.
>
> … I would have thought, on reading the affidavits, that there was an overwhelming inference that the evidence was both ingenious and so suspicious that, without cross-examination, it should any way be rejected. If, however, (the learned judge) was not prepared, as he was not, to go as far as that, it was, in my view, his duty to admit the cross-examination in order to determine whether the evidence was reliable.

[31] On the set of facts and circumstances, in the instance case, this court is of the respectful view that the applicant ought to have applied to cross examine the deponents of the affidavit by and on behalf of the respondents as this court finds that the affidavits on behalf of both parties had raised a conflict of evidence upon a relevant fact and the cross-examination would have advanced the course of justice and the truth of the averments in the affidavits, if that was done, perhaps they could have tilted the evidence (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 217 which was followed in *Syed Ibrahim bin Syed Abd Rahman v Liew Soo Chin (F)* [1984] 1 MLJ 160 at p 163; *Kepong Industrial Park Sdn Bhd & Ors v Teo Seng Aun & Ors (No 3)* [2000] 4 MLJ 614 at p 616–617).

[32] On the totality of the evidence, this court is also not satisfied that the respondents had notice of the express terms of the said ex parte injunction which admittedly was communicated at 11.08am to the freelance process server, En Albert Francis thereby leaving only two (2) minutes for En Albert Francis to announce to the members present at the EGM. It is important to pose this question and which has not been answered to the satisfaction of this court beyond reasonable doubt and remains doubtful, *first*, what was actually told to En Albert Francis over the telephone by learned counsel, En Leong, and whether it was taken down and recorded by En Albert Francis, *secondly*, whether it was possible, to convey the terms of the said ex parte injunction

within the eight (8) minutes as it required explanation as to what the first respondent can do and what he cannot do, and in addition, the injunction has imposed an obligation on the secretary of the company to carry out certain terms, and *thirdly*, whether En Albert had reduced the terms of the ex parte injunction at least in a summary form as to what he was informed by learned counsel, En Leong and *fourthly*, what was exactly told by En Albert Francis to the members present at the EGM as the charge is for having breached the terms as contained in the ex parte injunction (see *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1)* [2005] 5 MLJ 489 at p 516, *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v MD Jaafar bin Abdul Carrim & Anor* [1998] 2 MLJ 244).

[33] On the totality of the facts and circumstances in the instant case, this court is not satisfied that the respondents had breached the terms of the said ex parte injunction. The question of the respondents having breached the term of the ex parte injunction order did not arise unless they have knowledge of the terms of the injunction and not just based on an announcement by a freelance process server who did not himself have a copy of the said ex parte injunction granted by this court and who did not produce any letter of authority as to his position or status in relation to the applicant's solicitor's firm. It is also important to observe that the respondents in the instant case are laymen who have been accused of having breached the terms of the injunction which contain both negative and positive terms unlike the case in *Lee Lim Huat v Yusof Khan bin Ghous Khan & Anor* [1997] 2 MLJ 472; [1997] 3 CLJ 197 where the parties are lawyers. Further, it is also unclear as to the exact time the respondents had been informed and the status of En Albert Francis who is a freelance process server and who was a complete stranger to the respondents and members present at the EGM and his announcement as alleged to the members of EGM was done without producing any letter of authority either by the applicant's solicitor or the court. Therefore, as stated above, there was no necessity or requirement for the respondents to seek any clarification or confirmation from the applicant's solicitor or the court on the said ex-parte injunction as contended by learned counsel for the applicant.

[34] This court finds that the evidence produced by the applicant against the first respondent is insufficient to establish the charge beyond reasonable doubt. There is also insufficient evidence to establish the charge against the second and third respondents for allegedly aiding and abetting the first respondent with joint effort to ensure that the ex parte injunction is breached and not complied with. There is no evidence of sufficient cogent facts to draw an inference of any blatant disobedience of the said ex parte injunction as alleged and consequently to have committed contempt of court. The respondents are not obliged or required in law to disprove the prima facie case

as found by this court when it granted leave on 11 June 2007 pursuant to the ex parte application to the applicant to commence this committal proceeding and this is not the correct proposition in law as alleged in para 18 of the *Afidavit Balasan Plaintif* 2 (encl 119). The respondents are only obliged to raise a reasonable doubt against the charge framed and there is no duty on the part of the respondents to prove that they did not commit contempt of court.

[35] As the evidence in the instant case is produced through affidavit on behalf of both sides and the evidence from the affidavits are conflicting on material aspects, it is quite impossible to say that the guilt of the respondents had been proved beyond reasonable doubt (see *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126). As the respondents are in law, clearly entitled to the benefit of doubt there is no reason why the benefit of doubt ought not to be accorded to them when the court so finds. This court is not satisfied that the charge has been proved beyond reasonable doubt, on the facts and circumstances as in the instant case. Accordingly, the respondents cannot be committed for contempt of court and it is not safe to make such a finding (see *Re Bishop Ex parte Langley Ex-parte Smith* (1879) 13 Ch D 110). This court finds there is also no real risk to the administration of justice or that there is likelihood in any way to interfere in the proper administration of justice. In *Re B (JA) (An Infant)* [1965] 1 Ch 1112, Cross J said:

> Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison.

[36] In the event and in accordance with the rules of reasons and justice, this court finds that the applicant had failed to prove beyond reasonable doubt that the first respondent has committed contempt of court and the second and third respondents had aided and abetted the first respondent (see *Seaward v Paterson* [1897] 1 Ch 545, *Cham Pei Chin & Ors v Yap Sau Foong @ Yap Ah Kit & Ors* [2000] MLJU 306, *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] SGCA 10, *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151).

[37] In the circumstances and accordingly, this court finds the respondents not guilty of contempt of court. Consequently, the notice of motion (encl 47) is dismissed with costs.

Notice of motion dismissed with costs.

Reported by Kohila Nesan